Supreme Court, U. S.
FILED
AUG 6 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1731

DAILY MIRROR, INC.,

Petitioner,

vs.

NEW YORK NEWS INC., HARRY (HENRY) GARFINKLE, UNION NEWS INC., AMERICAN NEWS CO. INC. and ANCORP, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT W. FARRELL
Attorney for Petitioner
67 Park Avenue
New York, New York 10016
(212) 685-9346

(8846)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

TABLE OF CONTENTS

Page

Opinions Below 3

Jurisdiction 3

Questions Presented 3

Statement of the Essential Facts 5

Reasons for Granting the Writ 7

Introduction to the Points Herein 9

I. The bias-and-prejudice issue was entitled to an independent and individual appellate treatment, instead of the collateral, incidental, footnote treatment it received at the hands of the Court of Appeals (Petition for Rehearing, p. 17).

That issue was entitled to disentwinement and priority treatment in each court. 10

II. The novel issue, of a dutiful withdrawal, in high conscience, by the second panel of the Court of Appeals' judges, raised on the occasion of its necessary judicial deliberations, on petitioner's motion for rehearing, required its specific decision thereon, as part of due process (Petition for Rehearing, p. 25). 11

III. Any appeal would lie herein only from the final order of the District Judge, dated July 3, 1975, denying motion for vacature of the defaulted-judgment entry of June 11, 1975, brought on promptly within the ten-day period required by FRCP Rule 59(e). 12

Contents

Page

IV. The affirmance of grant of summary judgment, irrespective of other legal barriers, was barred by the statutes on summary judgment (FRCP, Rule 56[e]) and this Court's prior authoritative rulings. 13

TABLE OF CITATIONS

Cases Cited:

Berger v. United States, 255 U.S. 221 11

Forman v. Davis, 371 U.S. 178 13

Holt v. Virginia, 381 U.S. 131 11

In re Murchison, 347 U.S. 133 ..... 11, 12

McNutt v. Cardox, ____F.2d____ (C.A. 6, 1964) 12

Poller v. Columbia Broadcasting Co., 368 U.S. 464 ..... 4, 13

Rosen v. Sugarman, 357 (2d Cir.) 794 11

United States v. Ramos, 413 F.2d 743 13

Statutes Cited:

28 U.S.C. §1254(1) 3

28 U.S.C. §1291 ..... 4, 12

28 U.S.C. §455 ..... 8, 11

Contents

Page

Rules Cited:

Federal Rules of Civil Procedure:

Rule 56(c) 4

Rule 56(e) 13

Rule 54 12

Rule 59(e) 4, 12

APPENDIX

Order Denying Petition For Rehearing 1a

Opinion of the United States Court of Appeals 3a

New York Law Journal Report 8a

In The

Supreme Court of the United States

October Term, 1976

No.

DAILY MIRROR, INC.,

Petitioner,

vs.

NEW YORK NEWS INC., HARRY (HENRY) GARFINKLE, UNION NEWS INC., AMERICAN NEWS CO. INC. and ANCORP, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioner, Daily Mirror Inc., respectfully prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered on April 1, 1976, followed by its order of May 5, 1976, denying appellant's petition for rehearing.

The judgment of the Court of Appeals was upon an appeal from a final order, dated July 3, 1975, denying plaintiff's application of June 16, 1975, for vacatur and setting aside of a so-called final judgment entered June 11, 1975, taken upon a default, declared by the District Judge of the United States District Court for the Southern District of New York, on his own motion, with opinion, on June 9, 1975. Said opinion also, simultaneously, denied plaintiff's separate, individual application for his disqualification, brought under Sections 144, and 455, of Title 28 of the United States Code, while declaring same as made "in good faith." Thus no individual, or independent, appeal from said denial thereof, was possible, if rightful.

However, a prior motion to dismiss plaintiff-appellant's appeal or, alternatively, to limit its scope, had been denied by the Court of Appeals, unanimously, from the bench of three judges, on November 19, 1975, without prejudice to its renewal on the argument of the appeal. Said motion was then granted subsequently, in, and by the opinion of the Court of Appeals, to the limited extent originally applied for, thereby rendering possible a rationale for the affirmance, as set forth in said opinion.

These respective decisions and opinions are part of the appendix, *infra*.

Petitioner submits herewith copies of the main brief of the appellant below, and its petition for rehearing, which sets forth the nature of the issues raised below, for this Court's convenience, and a copy of appellant's memorandum of law, submitted in opposition to said motion to dismiss appeal.

OPINIONS BELOW

Copies of the opinion of the Court of Appeals (75-7450) and the two opinion dispositions of the District Judge (71C 1211) of June 9, 1975 and July 3, 1975, appear in the appendix, and also of the default judgment of June 11, 1975, entered without notice.

JURISDICTION

The judgment of affirmance of the Court of Appeals was entered on April 14, 1976, and the appellant's petition for rehearing, and other unusual relief was denied on May 5, 1976.

This Court's jurisdiction is invoked under Sec. 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether a party's default may be taken on the District Judge's own motion; or, any other decision, affecting the merits, may be made, and particularly against the party who had duly moved for the Judge's disqualification, while the Judge has said application *sub judice*; and more particularly, for said party's withholding of his answering papers to a pending motion for summary judgment by his adversary, and said application for disqualification is deemed to be "in good faith"? (Petition for Rehearing, p. 15).

(a) Whether the courts below were not required to isolate the issue of bias, and whatever ruling made thereon; and, thereupon, remand the action for independent opportunity to present its merits for an independent adjudication?

2. Whether a default judgment is a final appealable paper in the presence of a prompt motion, made within six (6) days, for opening said default and vacatur of the judgment entered

thereon? (Section 1291, Title 28, United States Code, and Federal Rules of Civil Procedure, Rule 59(e).

3. Whether the broad policy treatment prescribed by this Court in *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, 473, barring the granting of summary judgment in anti-trust conspiracy actions, brought under the Sherman and Clayton Acts, may be ignored by the court below, in favor of a technical construction and determination, by which route, appellant's appeal could be denied judicial consideration of its merits?

4. Whether the application for summary judgment by defendants-respondents, made solely upon attorneys' affidavits, in argument and evaluation, should not have been at once barred, as in violation of the Federal Rules, governing applications for summary judgment? [FRCP 56(c)].

(a) Whether, on the other hand, where appellant's evidence when presented on the merits, on application to vacate the default, stood admitted and uncontradicted, in support of the material allegations of the complaint, plaintiff-appellant was not entitled to judgment, in reverse, against the defendants, subject only to assessment of damages?

5. Whether, while the principal defendant-respondent stood before both courts below, in a state of actual contempt of the District Court's outstanding order, to produce, for court inspection, a key document (Contract of Acquisition) depicting the basic anti-trust violation, and criminal guilt of the statutes, any judicial entertainment of respondent's claims, and particularly, of a solicitous technical nature, was not out of order?

(a) Whether relief on appeal could be granted to the other co-defendants, who had deliberately failed to truly present briefs or argument in their defense, and three of the defendants-respondents used a private approach to the District Judge, only too late discovered?

(b) Whether the Court of Appeals should not, instead, have applied sanctions against counsel for respondents for their demonstrated corrupted presentations to the Court of Appeals, instead of taking a tortuous path to affirm, through self-reversally producing a divided court of two panels, on a later inferior, and more offensive, presentation on the renewed motion to dismiss?

STATEMENT OF THE ESSENTIAL FACTS

The petitioner instituted an action against the five defendants, alleging concerted action to destroy the plaintiff as defendant News' prospective competitor in an otherwise already achieved monopoly market, infected with a large public interest in keeping open the channels of news dissemination and public opinion. The giant, defendant News, produced a morning tabloid in the huge New York market, which the plaintiff-petitioner invaded with its competitive newspaper, and was met with a fierce determination, to methodically destroy and eliminate it. That is virtually recognized at the outset, by the opinion of the Court of Appeals.

The co-defendants, also giants in their own news-periodical distribution field, had already partaken of secret, collusive arrangements and collaboration with the defendant News; and of which, they were earlier found guilty, by the same Court of Appeals and the same District Court. Thus, in 1971, the subject conspiracy, to eliminate this plaintiff-competitor, was all ready for a consummation, between them.

The defendant News had already spent undisclosed millions of dollars, to purify the New York newspaper area of the plaintiff's predecessor New York Mirror, with its circulation of 900,000, and had entered into a contract, dated October 15, 1963 to eliminate that competition; and when this plaintiff-petitioner set up its modern plant and distribution system, at initial cost of some $500,000, with good reportorial and editorial facilities, it was marked for destruction.

The prestigious attorneys, who were, and are, presently defending these respondents, were the same ones, who had prepared the said Contract of Acquisition and Elimination, now rejected the District Court's order for its production into court, in its original form; and before whose wilful refusal and contempt of court, the District Judge submissively yielded, taking plaintiff's "default" instead; and granting summary judgment unilaterally, and "on the merits"; and based upon only attorney's affidavits, professing no personal knowledge of the facts; and, while acknowledging, that plaintiff and its counsel were "in good faith" in seeking his disqualification; and all, in the midst of a mysterious disappearance from the District Court Clerk's office of the affidavit in recusance, filed for the attention of the District Judge, making for said "default"!

The District Judge, taking, to himself, an extension of time for the promised trial in the delaying presence of the disqualification application, however, granted no corresponding extension to plaintiff for filing answering affidavits. Instead, he made a single-package decision, both denying disqualification, and granting "default" judgment. To all this, and more, the Court of Appeals, effectually turned a deaf or indifferent ear, as the opinion discloses, taking recourse, to produce an affirmance, by an adoption of an indirect and tortuous route, of reversing a prior unanimous panel of three judges of the court; who, from the bench had rejected, unanimously, defendant News' alternative motion to dismiss the appeal, both absolutely and limitingly, but not without first having made a bench observation, to movant counsel; in substance, as follows:

> "That the abrupt decision of the District Judge, in simultaneously denying both the application for disqualification, and on his own motion, granting surprise judgment by default, against the plaintiff, deprived plaintiff of reasonable opportunity to file answering papers on the merits in opposition to summary judgment."

No determination by the Court of Appeals, was made, on this appealable, substantive, permeating issue, denying disqualification, — except as a footnote. The claim of the District Judge, that plaintiff was not prosecuting its action, taking its default, came at a time, when plaintiff's prosecution was most intense; and while plaintiff was awaiting, also, defendant News' compliance with the District Court's order for the production, in its original form, of the aforesaid key Contract; which, undoubtedly, would have altered the course of things and probably necessitated further discovery before trial of its, also, undisclosed signatories.

Moreover, that decision, for default, had been preceded by a private letter of approach to the District Judge, by attorney for the three of the five defendants, Roy Cohn, Esq.; only much later discovered by plaintiff; and all of which was presented to the Court of Appeals, without any note taken thereof by the Court of Appeals, in its opinion.

All this, on the other hand, was sidetracked by the Court of Appeals, concentrating on the technical need, instead, to limit the scope of the appeal, on the originally completely rejected motion to dismiss the appeal, anew presented, as authorized, but on a much inferior showing, and a more offensive and disciplinable presentation.

REASONS FOR GRANTING THE WRIT

1. Petitioner believes that the preservation of the entire original, and appellate, judicial process cries out for vindication, in the special facts of this case (Petition for Rehearing, p. 8), dealing with, till now, unrebuked, demonstratedly corrupt, and contemptuous, approaches by, or on behalf of giant malefactors of wealth, in each court below, with an intolerable indifference thereto, at each level. This Court should place itself in the vanguard of justice's role in the nation.

2. A large public interest, in the maintenance of competition in a strategic area of news dissemination and opinion, endangered by the elimination, by methodical destruction, by a giant monopoly defendant newspaper publisher, the largest in America, of a competitor invading its field; and utilizing the ready-at-hand collaboration of other giant enterprises, and agencies in related fields, in the persons of these co-defendants; proven malefactors of great wealth, so adjudicated (Petition for Rehearing, p. 4) in the same two courts below, in earlier days, and shown undisputedly to enjoy Mafia connections in enforcement of their business interrelationships (Petition for Rehearing, p. 3).

3. The actual situation of a divided Court of Appeals, on the technical issue, of motion to dismiss appeal; which proved to be pivotal, in enabling the Court of Appeals, to render judgment of affirmance, on a narrower basis, in the presence of a virtual, one-sidedly favorable record, for the plaintiff-petitioner on the merits.

4. A case of novel impression, arising under the newly amended Section 455, Title 28, United States Code, by Act of Congress, of December 5, 1974, dealing with the initial "duty" of the District Judge, and then with the like initial "duty" of the Judges of the Court of Appeals, as herein invoked (Petition for Rehearing, p. 25), under the new congressional imperative, the "appearance of Justice" doctrine, embodied in the amended statute (Petition for Rehearing, p. 12).

5. The joint presence, and co-existence, of the incompatible issues of bias, and the merits; with indifference to the priority question, which goes to the heart of the administration of the adjudicative process; with the bias issue, relegated to footnote treatment by the Court of Appeals; and the importance of barring the use of a bias application as a retaliatory vehicle.

INTRODUCTION TO THE POINTS HEREIN

The opinion rendered by the Court of Appeals, in affirmance, as with the District Judge's opinion, in each capital respect, was without due regard for this Court's respective prevailing rule on such issue; even as also it treated with silence, those important evidences of disciplinable conduct on the part of the defendants, and their counsel.

Petitioner will not further belabor the unrebuked state of the defendants' presented record in both courts. To this date, also, there has been no disposition by the Court of Appeals (Petition for Rehearing, p. 23) of appellant's specifically authorized motion, to strike respondent's answering brief (Petition for Rehearing, p. 8), for its permeatively corrupted offering.

In this limited space, petitioner will not detail. Petitioner, however, will, under separate point headings, cite the respective prevailing law and rule, as laid down by this Court, — heretofore disregarded below, to thereby facilitate the respective courts, to render decisions against plaintiff-appellant. (The treatment of the District Court is set out in full in the accompanying copy of appellant's main brief, used below; and, analysis of the equally surprising treatment, given in the Court of Appeals, in its opinion of affirmance, appears fully set out in petitioner's unusual, four-pronged petition for complete rehearing *de novo,* as in its caption set forth.)

Petitioner submits that this Court, by its own prevailing rule of authority in each respect, has barred the respective principal conclusions and dispositions made by the Court of Appeals in its opinion of affirmance of May 5, 1976.

The attention of this Court is called, collectively, to:

(a) the egregious conduct, before the Court of Appeals, of the attorneys (Petition for Rehearing, p. 8);

(b) particularly the *ex parte* letter of Roy Cohn, to the District Judge (Appellant's Main Brief, p. 70-71; Petition for Rehearing, p. 25);

(c) The Court of Appeals' most recent admonition to all its District Judges (Appellant's Main Brief, p. 76).

In sharp contrast, to the tolerance, or indifference, of both courts below, to the falsifications and misconduct of counsel, we submit the prompt responsive action, taken by District Judge (S.D.N.Y.) Owens, toward ordering discipline of an offending attorney before him, falsifying on even a "non-germane" matter. See New York Law Journal report thereon, photostat attached to petition for rehearing.

I.

The bias-and-prejudice issue was entitled to an independent and individual appellate treatment, instead of the collateral, incidental, footnote treatment it received at the hands of the Court of Appeals (Petition for Rehearing, p. 17).

That issue was entitled to disentwinement and priority treatment in each court.

As in the case of the District Judge below, who had sought, unduly hastily, to grant a default summary judgment, the Court of Appeals employed a single-package treatment of the three independent subjects:

(a) plaintiff's claim of bias;

(b) the merits of the motion for summary judgment, and

(c) the Judge's own motion in declaring default, when no party was asking for it!

That was done in a manner, at once recognized as improper, by sitting Circuit Judge Gurfein, when, on the first panel treatment, the Court of Appeals unanimously rejected, from the bench, respondents' motion to dismiss petitioner's appeal. (Petition for Rehearing, p. 2).

This Court of Appeals in *Rosen v. Sugarman,* 357(2) 794, at p. 797, itself has laid down the rationale, which should control the priorities herein (Petitioner for Rehearing, quote on p. 16; Appellant's Main Brief, cases on pp. 52-57).

Berger v. United States, 255 U.S. 221, and *In re Murchison,* 347 U.S. 133, 166, are two cases wherein this Court set the now prevailing rule; which were passed over in silence, by the footnote-treatment affirmance opinion. It should be added that, if the District Judge had given the bias application its logical priority, and as statute (Sec. 144) mandates, no "default" issue, and no issue of what is the appealable paper, covered by Point III herein, could have arisen.

II.

The novel issue, of a dutiful withdrawal, in high conscience, by the second panel of the Court of Appeals' judges, raised on the occasion of its necessary judicial deliberations, on petitioner's motion for rehearing, required its specific decision thereon, as part of due process (Petition for Rehearing, p. 25).

This Court has held in a mere $50-contempt-fine case, that a claim of bias, addressed to a federal judge, must be determined, and cannot be disregarded or passed over. (*Holt v. Virginia,* 381 U.S. 131). Congress' recent enactment of an amendment to Section 455 of Title 28 U.S.C., makes the "appearance of justice" doctrine now a matter of statutory mandate, and a reality, and also applicable to federal judges at all levels, appellate and original.

The need for the second panel's withdrawal was enlarged by its overrule of its coordinate panel; whose expressed rationale, for prompt rejection of the motion to dismiss the appeal, was treated also with silence, in face of respondents', painstakenly demonstrated, contumacious approaches on the motion-renewal occasion (Petition for Rehearing, p. 8). In aggravation, the self-reversal was used to pave the way, instead, for the technical affirmance, brushing over, by use of the footnote, the primary obligation of the Appellate Court to weigh the priorities of the bias claims. *In which event, affirmance, and the merits of the action, would never* have been reached; and remand by the Court of Appeals for District Court treatment, in orderly priority on the merits of all remaining issues raised, would have followed, perhaps by a replacement District Judge. (See *In re Murchison,* 347 U.S. 133, 136 [Appellant's Main Brief, excerpt at p. 56].)

III.

Any appeal would lie herein only from the final order of the District Judge, dated July 3, 1975, denying motion for vacature of the defaulted-judgment entry of June 11, 1975, brought on promptly within the ten-day period required by FRCP Rule 59(e).

Finality of judgment, for purposes of appeal, is defined in Rule 54 of the Federal Rules of Civil Procedure; which is, "to include any order from which an appeal lies," and by Section 1291, Title 28, U.S.C. In *McNutt v. Cardox,* ____F.2d____ (C.A. 6, 1964) that court's rulings, in definition cite: *Berman v. United States,* 302 U.S. 212, 13; *DiBella v. United States,* 369 U.S. 121, 4 (Petition for Rehearing, p. 18). At page 19, *Cohen v. Beneficial,* 337 U.S. 541, is quoted, in its functionally defining "final" appealable paper.

Thus, a default judgment is no subject for appeal in any event; and the entire rationale, employed by the Court of

Appeals for granting affirmance, on the limited technical bases asserted, must be deemed to fall; and its affirmance, therefore, also to fall with it, bringing the issues back to the first one, — of the priority of the pending initial recusance.

To grant this affirmance by the technical route employed, flouted this Court's own most liberal rule, laid down in *United States v. Ramos,* 413 F.2d 743, by this Court of Appeals, citing *Forman v. Davis,* 371 U.S. 178 (Petitioner for Rehearing, pp. 21-22, as authority therefor).

IV.

The affirmance of grant of summary judgment, irrespective of other legal barriers, was barred by the statutes on summary judgment (FRCP, Rule 56[e]) and this Court's prior authoritative rulings.

Bare affidavits of attorneys, merely rendering evaluative and argumentative opinions and conclusions of their own, as sole basis for summary judgment, are specifically barred by those rules; which warranted instead, instant denial of such motion, before adversaries were, at all, called upon for answering papers. Thus, any question of "default" was, and would be, premature, and could not arise. Worse, affidavits of attorneys of a bare, "me-too," chorus nature, were inadmissible (Appellant's Main Brief, pp. 33, 63).

This Court has broadly barred summary judgment in favor of Sherman-and-Clayton-Act suit defendants; and in fact, the District Judge in his opinion, so also held, *assuring* the parties of a forthcoming trial in any event. Triable issues are always assumed in such cases, intent being an issue of fact, not resolvable on affidavits in any event (Main Brief of Appellant, p. 72).

There, *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 73, lays down the rule in bar. The District Judge

hereinbelow had also effectively cited that same rule, when assuring plaintiff of an early future trial of the issues raised by the complaint and the five (5) answers on file.

CONCLUSION

WHEREFORE, petitioner prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review the judgment, opinion, and the orders of the Court of Appeals affecting its self-reversed order denying respondents' motion to dismiss appeal.

Respectfully submitted,

s/ Robert W. Farrell
Attorney for Petitioner

APPENDIX
ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of May, one thousand nine hundred and 1976.

Present:

HON. WILFRED FEINBERG

HON. JAMES L. OAKES

HON. ELLSWORTH VANGRAAFEILAND,

Circuit Judges.

DAILY MIRROR INCORPORATED,

Plaintiff-Appellant

v.

THE NEW YORK NEWS INC., HENRY GARFINKEL, AMERICAN NEWS COMPANY, INC., UNION NEWS COMPANY INC., and ANCORP, INC.,

Defendants-Appellees

Order Denying Petition For Rehearing

Docket No. 75-7450

United States Court of Appeals
Filed
May 5, 1976
A. Daniel Fusaro, Clerk
Second Circuit

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 555—September Term, 1975.

(Argued February 19, 1976 Decided April 1, 1976.)

Docket No. 75-7450

DAILY MIRROR, INC.,

Plaintiff-Appellant,

v.

NEW YORK NEWS, INC., HARRY GARFINKLE, UNION NEWS COMPANY, INC., AMERICAN NEWS COMPANY, INC., and ANCORP, INC.,

Defendants-Appellees.

Before:

FEINBERG, OAKES and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a memorandum decision and order of the United States District Court for the Southern District of New York, Marvin Frankel, *Judge*, refusing to vacate that court's earlier decision which denied plaintiff's motion seeking recusal of trial judge and granted defendants' motion for summary judgment.

Affirmed.

ROBERT W. FARRELL, New York, N. Y., *for Plaintiff-Appellant.*

MARK D. GERAGHTY, New York, N. Y. (Townley, Updike, Carter & Rodgers, New York, N. Y., Frederick D. Berkon, of Counsel), *for Defendant-Appellee New York News, Inc.*

BARRETT G. KREISBERG, White Plains, N. Y., *for Defendant-Appellee Harry Garfinkle.*

ROY M. COHN, New York, N. Y. (Saxe, Bacon & Bolan, P.C., New York, N. Y., of Counsel), *for Defendants-Appellees American News Company, Inc., Union News Company, Inc. and Ancorp, Inc.*

PER CURIAM:

On January 4, 1971, plaintiff corporation commenced publication of a tabloid newspaper, the *Daily Mirror*, designed to compete with the *Daily News*. Almost from its inception, the *Mirror* encountered difficulties in distributing its papers to newsstands.[1] Accordingly, in March 1971, plaintiff filed suit in the United States District Court for the Southern District of New York against the *News*, three companies engaged in the distribution of newspapers and Harry Garfinkle, a principal of these companies, alleging a conspiracy to drive plaintiff out of business by impeding the distribution of its newspaper. The complaint charged the defendants with violations of Sections 1 and 2 of the Sherman Antitrust Act,[2] the state antitrust laws and common law, and demanded ninety million dollars in damages.

Although defendants answered the complaint and served interrogatories in April 1971, plaintiff made no effort to

1 The *Mirror* finally ceased operations on March 1, 1972.

2 15 U.S.C. §§ 1 and 2.

press its lawsuit. It was not until two years later, when it was faced with the trial judge's threat to dismiss the action for failure to prosecute, that plaintiff finally responded to these interrogatories.

In March 1975, following another two years of markedly little progress, this action was reassigned to Judge Frankel under the Southern District's Plan for the Reallocation and Disposition of Three-Year Old Civil Cases. In accordance with the Plan, a pretrial conference was held on March 26, and a trial date of June 9, 1975 was set. During the course of this conference, defendants sought permission to move for summary judgment. Although Judge Frankel felt that antitrust cases were among the least likely candidates for summary adjudication, he consented to hear the motion and set a schedule for submission, requiring moving papers by May 5 and answering papers by May 27. Defendants' motion papers were timely submitted.

On May 29, in response to an inquiry from Judge Frankel's chambers, plaintiff's counsel stated that he had decided not to file any answering papers but that, instead, he was filing an affidavit seeking Judge Frankel's withdrawal from the cast because of his "bias and prejudice". On June 2, Judge Frankel wrote the parties advising them that he was seriously considering granting summary judgment "against the defaulting plaintiff" although he planned to give full attention to its recusal motion.

On June 9, 1975, Judge Frankel issued an opinion denying the recusal motion, granting summary judgment for the defendant and, in the alternative, dismissing plaintiff's suit for failure to prosecute. No notice of appeal was filed from this decision. Instead, plaintiff moved to vacate pursuant to Fed.R.Civ.P. 60(b).[3] On July 3, this motion was

3 At the same time or shortly thereafter, plaintiff submitted papers in opposition to the summary judgment motion and an additional affi-

denied without opinion. On July 29, plaintiff filed a notice of appeal, listing the July 3 decision alone as the subject of its appeal. Although some three months later plaintiff sought to amend its notice of appeal to encompass the June 9 decision as well, the inefficacy of this procedure is apparent.

While a mistake in designating the judgment appealed from is not invariably fatal so long as the intent to appeal from a specific judgment can be fairly inferred, *Foman* v. *Davis*, 371 U.S. 178, 181-82 (1962); *Terkildsen* v. *Waters*, 481 F.2d 201, 206 (2d Cir. 1973), plaintiff's noncompliance with Fed.R.App.P. 4(a) prevents it from benefiting from this liberal standard. A motion for relief under Rule 60(b) does not terminate the running of the time for appeal set forth in Rule 4(a), *Pulliam* v. *Pulliam*, 478 F.2d 935, 937 n.6 (D.C. Cir. 1973); 9 J. Moore, Federal Practice ¶ 204.12 [1] (2d ed. 1973).[4] Consequently the July 29 notice of appeal was not timely filed with respect to the June 9 decision. Indeed, plaintiff's counsel conceded at oral argu-

davit seeking Judge Frankel's recusal. In a June 23 order Judge Frankel reaffirmed his denial of the motion seeking his withdrawal.

4 While there may be cases in which a Rule 60(b) motion made within ten days after entry of judgment may be treated as a motion under Rule 59(e), which does terminate the running of time to appeal, see 9 Moore, Federal Practice ¶ 204.12[1], at 953 & n.11; *cf. Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 631-32 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967), such treatment is at most discretionary and under the circumstances herein would be inappropriate. Although plaintiff's initial motion papers were filed within ten days of Judge Frankel's decision, those papers on their face indicated that they did not constitute the complete motion, and that further affidavits would be forthcoming. Those affidavits, the first to deal with the merits of the summary judgment, were not filed until June 27. Under these circumstances, and given plaintiff's failure to include the original judgment of June 9 in his notice of appeal, to treat what plaintiff called a 60(b) motion as a 59(e) motion, so as to extend the time to appeal from the original judgment, and then to construe a notice of appeal which does not mention that judgment as an appeal from it, would be to carry procedural leniency to an extreme.

ment that only Judge Frankel's denial of the 60(b) motion was properly before us for appellate review.

An order denying relief under Rule 60(b) is an appealable order, but the appeal brings up only the correctness of the order itself. *Hines* v. *Seaboard Air Line R.R. Co.*, 341 F.2d 229 (2d Cir. 1965); *Wagner* v. *United States*, 316 F.2d 871 (2d Cir. 1963). It does not permit the appellant to attack the underlying judgment for error that could have been complained of on direct appeal. *Sampson* v. *Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970); 9 J. Moore, Federal Practice, *supra*, ¶ 204.12[1]. Moreover, the denial of a motion to vacate will be reversed only upon a clear showing of an abuse of discretion, *Sampson* v. *Radio Corp. of America, supra; Hines* v. *Seaboard Air Line R.R. Co., supra; Wagner* v. *United States, supra*, and plaintiff has utterly failed to make such a showing.

Plaintiff's counsel knew a full week prior to the June 9 decision that the trial judge was seriously considering granting defendants' motion for summary judgment as a consequence of his failure to respond thereto. Nonetheless, he failed to take any action to remedy the situation.[5] It was only after Judge Frankel had issued his opinion and order that plaintiff sought to submit any responding papers. In the face of such dilatory conduct in a four year old lawsuit, Judge Frankel's refusal to vacate his prior decision cannot be considered an abuse of discretion.

Affirmed.

5 Plaintiff's claim that the trial judge was required to grant him additional time to respond to the summary judgment motion after he had acted on the recusal application instead of deciding both matters simultaneously is without merit. 28 U.S.C. § 144 necessitates only that a judge suspend further proceedings in an action where a "sufficient" affidavit has been filed to mandate recusal. This was not the situation below. Plaintiff's affidavit wholly failed to establish a personal bias derived from an extra-judicial source. *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Wolfson* v. *Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968).

NEW YORK LAW JOURNAL REPORT

COUNSEL FOR INVESTORS' GROUP AGAINST TELEPROMPTER

FEDERAL JUDGE MOVES TO HAVE LAWYER DISCIPLINED FOR GIVING 'FALSE' TESTIMONY

A federal judge this week accused an attorney appearing before him of giving "false testimony" and referred the matter to the chief judge of the district court for possible disciplinary action.

The action came Tuesday from Judge Richard Owen, of the U.S. District Court for the Southern District of New York, in an eighteen-page opinion in *Independent Investor Protective League v. TelePrompTer Corporation*, 73-4133.

Attorney Cited

The action was taken against I. Walton Bader, who is counsel for the league and other plaintiffs in a suit alleging violation of an antifraud provision of a federal securities law in reporting the financial affairs of TelePrompTer. Defendants also include the company's officers and directors and Touche Ross & Company, its then auditor.

The action has been consolidated, along with other similar cases, before another judge but Judge Owen was deciding a motion to impose sanctions against the league, Mr. Bader and others made by the auditor over the service of copies of plaintiffs' answers to interrogatories.

In his decision, the judge dismissed with prejudice the case against the auditor and ordered the league and Mr. Bader to pay it costs and attorney's fees from Sept. 6, 1974, the day after answers to the interrogatories were to have been served.

New York Law Journal Report

Facts Stated

On Sept. 5, 1974, the last day to receive the answers, according to Judge Owen, the auditor's attorney, Rosenman, Colin, Kaye, Petschek, Freund & Emil, received unconformed copies of the answers of three plaintiffs. Actually, according to the judge's ruling, none of the answers had been received by Mr. Bader.

"On the entire record," the judge said he could not but help "conclude that Mr. Bader intended the Rosenman firm to believe that the various answers to interrogatories were due and timely served . . . when in fact they had not been."

Judge Owen continued by stating that Mr. Bader had made "false statements and gave false testimony pursuant to an evolving plan to first deceive counsel and later the court as to the circumstances surrounding the mailing of the purported 'answers' to interrogatories."

'Flat' Concession

Mr. Bader, the judge stated, had "flatly conceded" to a Rosenman, Colin attorney and "later to the court" that two of the original answers "had never been received" and given Mr. Bader's story of his activities on Sept. 5, the answer of the third plaintiff "could only have arrived on a subsequent day."

"While it is not germane to a determination of the motion of Touche Ross," Judge Owen concluded, "it is not inappropriate to observe that conduct such as that engaged in by plaintiffs' counsel herein cannot and will not be countenanced by the court.

"I am, therefore, referring this record for further consideration pursuant to Rule 5(f) of the general rules of this court providing for the disciplining of attorneys."

New York Law Journal Report

Rule 5(f)

Rule 5(f) provides that complaints alleging that an attorney has been guilty of fraud, deceit or malpractice shall be presented to the chief judge for possible censure, suspension or disbarment of the attorney.

If the chief judge thinks the charges are of sufficient weight, they are referred for preliminary investigation and recommendation to a bar association, which then reports back to the chief judge.

The rule then sets forth the method for proceeding to a hearing before a judge or judges or before a master. After this, the court takes such action as "justice may require."

When informed of the judge's ruling yesterday, Mr. Bader said he will appeal the dismissal and "I assume I will have to defend myself" against the charges of misconduct.

Supreme Court, U. S.
FILED
AUG 19 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-173

DAILY MIRROR, INC.,

Petitioner,

vs.

NEW YORK NEWS INC., HARRY (HENRY) GARFINKLE, UNION NEWS INC., AMERICAN NEWS CO. INC. and ANCORP, INC.,

Respondents.

SUPPLEMENTAL APPENDIX

ROBERT W. FARRELL
Attorney for Petitioner
67 Park Avenue
New York, New York 10016
(212) 685-9346

(8846)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

TABLE OF CONTENTS

Page

Decision of D.J. Frankel Dated June 9, 1975 Granting Summary Judgment by Default Etc. 1sa

Decision Dated July 3rd, 1975 (Filed July 7th, 1975) of D.J. Marvin E. Frankel Denying Motion to Vacate 9sa

Isa

DECISION OF D.J. FRANKEL DATED JUNE 9, 1975 GRANTING SUMMARY JUDGMENT BY DEFAULT ETC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAILY MIRROR, INC.,

Plaintiff,

-against-

NEW YORK NEWS INC., HARRY GARFINKLE, UNION NEWS COMPANY, INC., AMERICAN NEWS COMPANY, INC., and ANCORP, INC.,

Defendants.

71 Civ. 1211

FRANKEL, D.J.

This action was brought over four years ago. Plaintiff corporation, which commenced publication on January 4, 1971, of a tabloid newspaper,[1] charged that defendants — a highly successful competitor, three companies engaged in the distribution of newspapers and other publications, and an individual principal of these companies — had violated the antitrust laws by conspiring from January 1971 to restrain and monopolize commerce in the dissemination of news and newspapers. Defendants' objects, plaintiff alleged, included in general the suppression of competition, specifically the elimination of plaintiff as a competitor, and the concerted refusal to distribute plaintiff's newspaper to newstands and other distribution points controlled or serviced by defendants. With

1. Plaintiff's paper, called "The Daily Mirror," was unrelated to a once famous newspaper, "The New York Mirror," which ceased publication in 1963.

the specification of further details not now necessary to recount, plaintiff charged wrongs under the state as well as the federal antitrust statutes plus a common-law count for conspiratorial and malicious injury. Damages amounting to some $90,000,000 were sought, together with costs and attorneys' fees.

While the complaint seemed to propose questions of possible moment, it was prosecuted only occasionally and slowly. Within months after the start of the case, plaintiff's chief executive officer was substituted as counsel in place of the original attorney. While the action had been brought a scant two months after plaintiff embarked on its risky venture in competition with two of the world's most powerful newspapers, plaintiff did nothing to press it for over two years, having in the meantime ceased publication altogether about a year after beginning its business and this lawsuit. When there came a threat of dismissal for want of prosecution, in the summer and fall of 1973, plaintiff took some depositions. About a year later there were some interrogatories. Sporadic motions were made along the way. Defendants' interrogatories were answered only under a threat of dismissal as the alternative. The answers finally made were notable for their brevity and asserted lack of pertinent information.

Without recounting every procedural detail, it suffices for now to recall that on March 14, 1975, this ancient case was reassigned to me under this court's "Plan for the Reallocation and Disposition of Three-Year-Old Civil Cases." The plan, as bench and bar were made vividly to understand, was designed to see that cases like this one were given the highest possible priority so that we could move closer to the ideal of current dockets and reasonably prompt trials for litigants who want them. The rules to accomplish this were thoroughly publicized. These provided, *inter alia:*

"By April 1, 1975, each judge shall notify counsel in each of the 'old cases' then on his calendar * * * of a pretrial conference no later than May 15, 1975. At such conferences, all the cases will be set for trial during the 6-week 'crash' period commencing June 2, 1975 and ending July 11, 1975, in chronological sequence as nearly as possible, each trial to commence upon conclusion of the trial of a specified preceding case. Claims of conflicting assignments in other courts, vacation schedules or personal commitments shall not be accepted as an excuse except on a showing of extraordinary hardship. Counsel shall be notified that if they are not ready for trial when called, their cases shall be subject to dismissal for want of prosecution or to striking of their pleadings and entry of default."

In accordance with the rules, this case was called for a pretrial conference on March 26, 1975. Counsel were reminded that it must be readied for trial with minimum delay. Stringent limits were ordered on any further discovery. It was pointed out that desired witnesses who have not been deposed during all these years may be subpoenaed for the trial, a course less wasteful of time in the end than allowing the case to drag on in its accustomed way. Counsel were advised on March 26 to be ready for trial on the morning of June 9, 1975.

Defendants urged, however, that they be given an opportunity to move for summary judgment. In informal discussions, I pointed out the seeming remoteness of the possibility that any such motion could succeed, moved by fairly obvious thoughts:

> *First,* that a supposedly large antitrust case is among the least likely candidates for summary judgment.

Second, that the motion should better have been made earlier.

In seemingly cogent answer to both points, counsel brought to my attention that there was no pretrial order in the case; that a summary judgment motion, even if denied, could serve to crystallize the issues to be tried; and that this antitrust case, however large and complex a matter the complaint might have seemed to portend, was actually of exceedingly modest proportions in terms of what plaintiff might hope to present in the way of evidentiary material. Adhering to the prediction that it could not succeed, and reemphasizing that the date of June 9 for trial would still stand, I agreed that the motion should be brought, duly opposed, and decided. A schedule for submissions was made. One or two brief adjournments were allowed. The motion papers — thorough and powerful, as will appear — were duly served and filed at the beginning of last month.

In the meantime, pursuing a course that does not appear to be new for him in this case, plaintiff's counsel continued small discovery efforts, wrote long and often vitriolic letters to me when his adversaries acted in ways he deemed unsuitable, and otherwise did nothing to advance his case. Responding sometimes without excessive patience, I demanded an end to the epistolary practice; instructed plaintiff's counsel to serve motion papers if he believed there were grounds for making motions; but reminded him that in the present posture the time for making all but the most indispensable of motions had largely run.

In light of, or perhaps despite that instruction, Mr. Farrell moved on May 19 for an order allowing further discovery and production of documents, permitting plaintiff to reargue for the disqualification of one of the attorneys in the case, and granting a further delay in this ancient case. That motion was made returnable May 27, the same return date carried by the summary

judgment motion.[2] On the afternoon of May 27, plaintiff's counsel was contacted by my chambers when it became apparent that no papers had been filed in opposition to the summary judgment motion. Plaintiff's counsel asked for a week's extension, and was given until May 30.

On Thursday afternoon, May 29, 1975, plaintiff's counsel reported by telephone to my law clerk, Mr. William J. Perlstein, that he had decided not to file any answer whatever to the motion for summary judgment but was instead filing an application in the form of an affidavit seeking my withdrawal from the case. Mr. Farrell stated, and was later to reiterate, that this paper was being filed that day. When we sought in the Clerk's office to obtain the paper, it was not there. It was not served then or thereafter upon opposing counsel. When this situation was called to Mr. Farrell's attention at the beginning of the following week and he was asked to file another copy, he balked initially unless the Clerk would docket it as having been filed on Thursday, May 29. Finally, upon my order, the Clerk accepted and docketed the paper, with the understanding that the claim of earlier filing would not thereby be deemed to be foreclosed. As it turns out, the date of filing is not important in any event. But it is perhaps pertinent to note that defense counsel swear they have not, at least until now, been served by plaintiff with the application seeking my recusal.

Coming at last to the application, I am compelled to find it insufficient for any purpose — either to accomplish my relief from the case or to delay further a decision in defendants' favor on their motion for summary judgment. As to the proposal that I recuse myself, Mr. Farrell swears it is made "in good faith," and I have no reason to question that. But it remains ineffectual. Mr. Farrell expresses his "belief and conviction" that I am "personally hostile to plaintiff's cause"; that he is being pressed

2. The eventual disposition herein, dismissing plaintiff's complaint, embraces of course a denial of the grossly tardy and otherwise unmeritorious motion of plaintiff.

to meet deadlines "without proper or just or due attention by the Judge to adversaries as the extensive cause for the delays the Judge is complaining of"; that I have been "over-harsh and oppressive and arbitrary" as well as "cursory"; that I have directed "anger" at plaintiff when it should be aimed at defendants; that he is convinced, in sum, "that he cannot get a fair disposition of the present motions and of the trial" before me.

I am sorry, of course, that Mr. Farrell perceives things like anger and personal hostility against himself and/or his client. I cannot pretend to be cheered by learning that he feels this way. But the duties of the office are plain and Mr. Farrell's complaints are plainly sleeveless. So far as I am aware, I have never known Mr. Farrell or his client until this case. Having seen him in person a single time, I sense for myself none of the hostile emotions he detects. Indeed, I have not known Mr. Farrell or this lawsuit long enough to have feelings about either that could fairly be dubbed "emotional." What is more vital in law is the obvious fact that his inferences flow only from my rulings and conduct as the judge assigned to this case. I think it clear that the assertions he presents fail on their face to make out any such "bias or prejudice" as could require — or entitle — me to remove myself from the case at this late date — or, indeed, at any time.

In order to reach and consider this question (including the location of the paper presenting it), I ordered the trial adjourned from June 9 to June 16, 1975. But it is time now to deal with the pending motion. And it develops that there will be no occasion to have a trial after all.

Apart from the regrettable fact that they are unopposed, the papers supporting the motion make a careful and compelling case for dismissal of the complaint. There are detailed and specific affidavits by the people with knowledge denying the acts

of conspiracy and other wrongdoing conclusorily charged in the complaint. Beyond that, defendants supply a highly persuasive account of facts which, even as plaintiff alleged them, presented a dubious setting for the allegations of wrongdoing. As has been noted, plaintiff charged a conspiracy beginning with the birth of its short-lived enterprise. It appears to be undisputed that plaintiff's newspaper was carried upon the allegedly offending newsstands during the first week or so of its publication. Contrary to the contention that this resulted from an oddly neglectful conspiracy which lapsed into forgetfulness for a week, defendants show that the altered situation was caused by plaintiff's change to a new wholesaler which offered the newspaper at a price increased beyond what defendant Ancorp deemed justified. It is sworn persuasively that defendant Daily News had nothing whatever to do with this business decision.

Beyond the detailed accounts supplied in their own affidavits, defendants review what they have learned from their own discovery efforts. They show the enormous probability that plaintiff could make no approach to a prima facie case at trial. Responding to interrogatories, plaintiff has acknowledged its entire lack of evidence to prove its charges. In a case this old it is much too late to try to resist summary judgment by saying plaintiff might be able to supply the missing evidence by calling upon defendants themselves. Plaintiff has had four years to make such calls and a court available to enforce them if resisted. The evident fact is that the discovery plaintiff has seen fit to undertake has not reinforced the gossamer of speculation and hope on which the action seems to have been rested from its inception.

The relevant learning concerning motions for summary judgment is clear and familiar. Defendants have done more than plaintiff, defaulting, is entitled to. Beyond confronting a plaintiff who does not deign to respond, defendants have shown that the absence of response reflects an overwhelming probability that

Decision of D.J. Frankel Dated June 9,1975

plaintiff has nothing to respond with. There is not in any pertinent sense any genuine issue as to any material fact. Defendants are entitled to the judgment they seek.

In sum, the motion for summary judgment is granted. Alternatively, or perhaps additionally, the circumstances would warrant dismissal of this ancient and evidently unmeritorious case for failure to prosecute. Plaintiff has managed to avoid utterly the steps ordered to ready the case for trial, scheduled over two months ago to begin today. Apart from more general rules and principles, the plaintiff is in default under this court's above-quoted Plan for cases as old and neglected as this.

The Clerk of the Court will enter judgment dismissing the case with prejudice and with costs to defendants.

It is so ordered.

MARVIN E. FRANKEL
U.S.D.J.

Dated, New York, New York
June 9, 1975

DECISION DATED JULY 3rd, 1975 (FILED JULY 7th, 1975) OF D.J. MARVIN E. FRANKEL DENYING MOTION TO VACATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAILY MIRROR INC.,

Plaintiff,

-against-

NEW YORK NEWS INC., et al.,

Defendants.

71 Civ. 1211

MEMORANDUM AND ORDER

U.S. District Court
Filed
Jul. 7, 1975
S.D. OF N.Y.

FRANKEL, D.J.

Plaintiff's motion filed June 30, 1975, and made returnable today seeks, "before a properly assigned Judge . . . or such other as may be assigned for the hearing hereof, . . . an Order vacating *ab initio* the . . . Decision-Memorandum [dated June 9, 1975], and any Judgment entered thereon or to be entered thereon, as an extra-judicial act, a legal anomaly, a nullity in law, an abortive attempt of the Judge to effect a single, joint and concurrent disposition of two incompatible judicial processes, one in personal recusance of the deciding Judge, and the other in

Decision Dated July 3rd, 1975 (Filed July 7th 1975)

adjudication of the pending case, and as surprise product of undue haste and a denial of due process, and for such other and further relief, by way of reinstatement of a time schedule for the further prosecution and defense of the within case, and otherwise as may be fitting in the premises."

The motion is denied.

It is so ordered.

MARVIN E. FRANKEL
U.S.D.J.

Dated, New York, New York
July 3, 1975